UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re: **CYRUS II, LP** **BAHAR DEVELOPMENT, INC.** **MONDONA RAFIZADEH, *ET AL*.,** **Debtors.**	§ § § § § § §	**CASE NO. 05-39857-H1-7** **(Jointly Administered)** **Chapter 7**
RODNEY D. TOW, **AS THE CHAPTER 7 TRUSTEE FOR** **CYRUS II, L.P., *ET AL.*** **Plaintiffs,** **vs.** **SCHUMANN RAFIZADEH, *ET AL*.,** **Defendants.**	§ § § § § § § § § § §	 **ADVERSARY PROCEEDING** **NO. 07-03301**

PLAINTIFFS' BRIEF ON WHETHER FEDERAL COMMON LAW CHOICE OF LAW RULES GOVERN COUNT 2 FRAUDULENT TRANSFER CLAIMS AGAINST COOB, L. P.
(Relates to Docket Nos. 643 and 705)

Rodney D. Tow, the Chapter 7 Trustee (the "Trustee") of the bankruptcy estates of Mondona Rafizadeh, Bahar Development, Inc., and Cyrus II, LP (collectively, the "Estates"), and ORIX Capital Markets, LLC, as the Special Servicer of the Trust for the Certificateholders of the Merrill Lynch Mortgage Investors, Inc. Mortgage Pass-Through Certificates, Series 1999-C, on behalf of the Trust and in the name of Wells Fargo Bank National Association, as Trustee for the Trust ("ORIX") (collectively, "Plaintiffs") hereby file this Plaintiffs' Brief on Whether Federal Common Law Choice of Law Rules Govern Count 2 Fraudulent Transfer Claims Against COOB, LP ("COOB") (Document No. 643).

Introduction

1. On July 1, 2008, the Court heard oral arguments from COOB and the Plaintiffs regarding whether Texas or Ohio substantive law governed the determination of the Plaintiffs' fraudulent transfer claim against COOB for Bahar Development, Inc.'s ("BDI") transfer of the Imperial Towers office buildings to COOB (the "BDI/COOB Transfer"). During oral arguments, the Court raised the issue of whether the Court should rely on federal common law choice-of-law rules as opposed to the Texas (the forum) choice of law rules in determining which state's substantive law should apply to Count 2 Fraudulent Transfer Claim Against COOB. The Plaintiffs asked the Court for time to brief the issue, and the Court set Friday July 11th as the deadline for the Plaintiffs to file their brief and Friday July 18th for COOB to respond.

2. The Plaintiffs' research and analysis has concluded that whether this Court decides to apply the "federal common law choice-of-law" analysis or proceeds under the *Klaxon/Erie* analysis as argued by the Plaintiffs in their initial Opposition (Docket No. 705), the result is the same: Texas substantive law on fraudulent conveyance should be applied to the BDI/COOB Transfer, not Ohio substantive law.

Analysis

A. **Federal Common Law Choice of Law Rules.**

3. Federal courts sitting in diversity jurisdiction are required by *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 1021, 85 L.Ed. 1472 (1941), to apply the choice-of-law doctrine of the forum state. *Erie R. R. Co. v. Tomkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Application of federal common law in specialized areas where jurisdiction is not based on diversity has been sanctioned by the Supreme Court since the *Erie* case was decided. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 795 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080, 101 S. Ct. 863, 66 L.Ed. 2d 804

(1981). In Count 2 of the Complaint, the Trustee seeks avoidance of a fraudulent transfer from BDI to COOB under section 544 of the Bankruptcy Code made by BDI in 2001, dated effective as of January 2000.

4. In the Second and Ninth Circuits, federal courts faced with the question of which choice-of-law to apply in a suit section 544 would apply federal common law choice of law rules. *In re Best Products*, 168 B.R. 35, 51 (Bankr. S.D.N.Y. 1994), *aff'd*, 68 F.3d 26 (2d Cir. 1995)(analyzing federal common law choice of law rules in the context of evaluating a 9019 motion of an LBO fraudulent conveyance lawsuit at confirmation); *see also, In re Miller*, 292 B.R. 409, 413 (9th Cir. 2003)(discussing federal common law choice of law in determining whether California or Nevada law applied to determine the enforceability of a gambling debt incurred in Nevada); *In re Vortex Fishing Sys., Inc.*, 277 F3d 1057, 1069 (9th Cir. 2002); *In re Lindsay*, 59 F. 3d 942, 948 (9th Cir. 1995); *In re Worldcom, Inc.*, 2003 WL 23861928 at *40 (Bkrtcy. S.D.N.Y. 2003) (". . . a conflict of law analysis must first be undertaken to determine which state's substantive law is applicable under section 544. In determining the choice of law issue, the federal common law choice-of-law rules would likely apply"). The rationale would be that the court possesses federal question jurisdiction over any claim based on section 544(b) of the Bankruptcy Code.

5. The Fifth Circuit has not spoken on the issue of whether federal courts should employ federal common law choice-of-law rules when it involves a claim based on section 544 of the Bankruptcy Code. *See, e.g.*, *Woods-Tucker Leasing Corporation of Georgia v. Hutcheson-Ingram Development Company*, 642 F.2d 744 (5th Cir. 1981)(whether bankruptcy court sitting in Texas should honor a contractual choice of Mississippi law in determining whether to apply Texas or Mississippi usury statute); *Asarco LLC v. Americas Mining Corporation*, 382 B. R. 49, 61 (S.D. Tex. 2007)("all parties ***agree*** that this is an appropriate case for this Court to abide by

the decision in *Klaxon* that the choice-of-law rules of the forum state, Texas, should apply.")(emphasis supplied). In *Woods-Tucker*, the Fifth Circuit stated that: "To the extent we are faced with the threshold question of whether a federal or a forum (Texas) choice of law rule applies, we see no need to resolve it." 642 F.2d at 748. Based on the research the Plaintiffs have undertaken, what the Fifth Circuit said in *Woods-Tucker* in 1981 remains true today: the issue has not been resolved by the Fifth Circuit.

6. Nevertheless, federal common law choice of law rules provides that a court should apply the law of the jurisdiction having the greatest interest in the litigation.[1] *See Koreag, Controle Et Revision S.A. v. Refco F/X Associates, Inc.*, 961 F.2d 341, 350 (2nd Cir. 1992) (as is the case in the instant litigation, the court "discerned no significant difference between the applicable federal and New York choice-of-law rules"). The federal common law approach, consistent with section 6(2) of the Restatement, is to employ the law of the jurisdiction with the most significant relationship to the action. Under this analysis, the Court is to evaluate the various contacts each jurisdiction has with the controversy, and determine which jurisdiction's laws and policies are implicated to the greatest extent. *Id.* Aside from the actual location of the Imperial Towers in Ohio, Texas laws and policies are implicated to the greatest extent as all the

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[1] Nevertheless, some courts will apply the choice of law rules of the ***forum*** state (Texas), rather than federal choice of law rules, when the state law claims do not impact federal policy. *See, e.g., ASARCO LLC v. Americas Mining Corp.*, 382 B.R. 49, 60-61 (S.D. Tex. 2007).

The Plaintiffs submit that in the instant case the analysis and the result either under federal common law choice of law rules or the traditional *Erie* analysis would be the same: Texas substantive law would apply to the BDI/COOB Transfer. A good articulation of the latter analysis is set out in *ASARCO*. There, the court began with the proposition that a claim for fraudulent transfer arises in tort, and under Texas choice of law rules governing tort, a court is to apply "section 145 of the Restatement (Second) Conflict of Laws, also described as the "most significant relationship test." *Id. at* 62; *see also, Amoco Chem. Co. v. Tex Tin Corp.*, 925 F. Supp. 1192, 1202 n.9 (S.D. Tex. 1996) (looking to the most significant relationship test when applying Texas choice of law rules to determine which State's law governs the fraudulent transfer claim). This approach has been held to be consistent with the "most significant contacts" approach of the Restatement (Second) of Conflict of Laws. *In re Vortex Fishing Systems, Inc.*, 277 F.3d 1057, 1069 (9th Cir. 2002); *In re Miller*, 292 B.R. 409, 413 (9th Cir. 2003).

activities relating to the BDI/COOB Transfer took place with citizens of Texas, with agreements drafted and executed in Texas and entities domiciled in Texas, not Ohio.[2]

B. If the Court Applied the Federal Common Law Choice of Law Analysis, Texas Substantive Law Would Govern the BDI/COOB Fraudulent Transfer.

7. Federal common law choice of law rules would dictate that the Court should apply the law of the jurisdiction having the greatest interest in the litigation by evaluating the various contacts each jurisdiction has with the controversy and determining which jurisdiction's laws and policies are implicated to the greatest extent. As shown below, the analysis clearly reveals that Texas—not Ohio[3]—is the jurisdiction with the greatest interest in the litigation.

Texas is where the activities giving rise to the injury arose.

8. ***Texas*** has the most significant relationship to the BDI/COOB Transfer under Section 6(2) of the Restatement. Texas has a premier interest in regulating the conduct of its citizens, preventing fraud, and preventing harm from occurring within the state. BDI is a Texas corporation that the Rafizadehs operated exclusively from Texas and used to inflict the injury this claim seeks to redress. The Rafizadehs planned, documented and implemented the

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2 If the Court concludes that the Texas's "most significant relationship" choice of law analysis should apply, the result is the same. *Best Products*, 168 B.R. at 51; *Worldcom*, 2003 WL at 40. ("The federal common law approach is to employ the law of the jurisdiction with the most significant relationship to the transaction and to the parties. Id., citing, *Best Products*, 168 B.R. at 51 ("choice of law test for torts under section 145 of the Restatement (Second) of Conflicts of Laws (the "Restatement") is applicable to fraudulent conveyances"). As detailed in the Plaintiff's Opposition to Defendant COOB, LP's Motion for Partial Summary Judgment on Count 2, Fraudulent Transfer, under §145 of the Restatement (Second) of Conflict of Laws, Texas is the state with the "most significant relationship to **the occurrence and the parties**." *ASARCO*, 382 B.R. at 62 (emphasis added). For these reasons, the Plaintiffs incorporate Plaintiffs' Opposition to Defendant COOB, LP's Motion for Partial Summary Judgment on Count 2, Fraudulent Transfer (Document No. 705) ("Plaintiffs' Opposition").

3 COOB's sole focus on the situs of the building fraudulently conveyed (Ohio) to the exclusion of all other factors is not appropriate here. The claim does not focus on title or whether the real estate/recording requirements were met. It is a claim for fraudulent transfer, which involves establishing that either (1) the transfer was made with the actual intent to hinder, delay or defraud a creditor, or (2) that the transfer was made without receiving reasonably equivalent value and the remaining assets were unreasonably small in relation to the business or the debtor incurred debts beyond its ability to pay as they became due. *See* Tex. Bus. & Com. Code Ann., § 24.005(a)(1).

BDI/COOB Transfer in Texas. The Rafizadehs made all decisions regarding the BDI/COOB Transfer in Texas. All conduct causing injury to BDI and its creditors occurred in Texas. The Rafizadehs signed and notarized all documents implementing the BDI/COOB Transfer in Texas. Mondona Rafizadeh, a Texas resident in 2000, signed the Warranty Deed for BDI as grantor (acting as BDI's president) and for COOB as grantee (acting as the manager of COOBGP) in Harris County, Texas before a Texas notary public.[4] Both BDI's address and COOB's address for the BDI/COOB Transfer are Texas addresses. The execution and implementation of the BDI/COOB transfer is consistent with the Rafizadeh's operation of both BDI and COOB from Texas, the situs of all the officers and managers of both BDI and COOB.

9. BDI's injury is centered in Texas. Damage occurred to BDI and its creditors in Texas. No one in Ohio suffered injury from the BDI/COOB Transfer. BDI has no creditors in Ohio. These factors point to Texas—not Ohio—as the state with the greatest interest in the BDI/COOB Transfer and supports the application of Texas substantive law to the Plaintiffs' fraudulent transfer claim relating to the BDI/COOB Transfer.

Texas is the location of the ownership, management and control of both parties to the BDI/COOB Transfer.

10. Texas is the location of the ownership, management and control of both parties to the BDI/COOB Transfer and, therefore, is the jurisdiction with the greatest interest in the claim. BDI is a Texas corporation.[5] BDI's mailing and business addresses are at 806 Main Street, Houston, Texas, and 1501 N. Main, Highlands, Texas.[6] BDI's officers, Mondona Rafizadeh,

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4 Certified Copy of Warranty Deed, attached at Exhibit "A" to the COOB Motion.

5 COOB Motion at ¶ 20.

6 *See i.e.* Ex. Rudd 7 to Plaintiff's Opposition; Bahar Development, Inc. letter to Mr. Barry Schwartz dated October 8, 2004, listing BDI's address at 806 Main Street, Houston, Texas, signed by Schumann Rafizadeh as BDI's vice president; Certified Copy of Warranty Deed attached as Exhibit "A" to the COOB Motion.

president, and Schumann Rafizadeh, vice president, are both Texas residents. URF, a Texas entity, owns all of BDI's stock.[7] Although COOB is an Ohio limited partnership, COOB (i) has a Texas business and mailing address; (ii) has been managed from Texas by Texas residents Schumann Rafizadeh, Mondona Rafizadeh and Azita Berglund (through AMI, a Texas corporation); and (iii) is owned by Texas residents.

11. COOB's mailing and business addresses are Texas addresses.[8] COOB Motion Exhibit "C", the filing receipt for COOB's Ohio partnership certificate, states that COOB's address is "COOB, LP, 806 Main Street, Ste 1210, Houston, TX 77002". Similarly, COOB Motion Exhibit "A" [the Warranty Deed from the BDI/COOB Transfers] lists that same Texas address for COOB. When Rodrick Hughes sent COOB a purported demand for payment on the Imperial Towers Note, he was in Texas and addressed and sent the letters to Texas—i.e., COOB, at "806 [M]ain Street, Suite 1602, Houston, TX 77006."[9]

12. COOB is managed through COOBGP's two members and managers, Mondona Rafizadeh and Schumann Rafizadeh, both Texas residents (and BDI officers). COOB also executed a "management agreement" with AMI (a Texas Corporation) to manage the Imperial Towers.[10] Ms. Berglund managed the Imperial Towers from her office at 806 Main Street, Houston, Texas. As discussed above, Mondona Rafizadeh, a Texas resident, executed the documents to implement the BDI/COOB Transfer for both BDI, as grantor, and COOB, as grantee, in Texas.

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7 Bahar Development, Inc.'s Statement of Financial Affairs filed in Case No. 05-39858 as Docket No. 20, Page 9.

8 Exhibits "A" and "C" attached to the COOB Motion.

9 Ex. Rudd 3 and 4 to Plaintiff's Opposition, Demand letters from Hughes to COOB dated April 7, 2006, and May 8, 2006.

10 Ex. Rudd 5 to Plaintiff's Opposition, Management Agreement dated March 1, 2005.

13. Only Texas residents and entities own COOB and its general partner COOBGP. URF, a Texas partnership, owns a 99% limited partnership in COOB.[11] Texas residents, Schumann and Mondona Rafizadeh, and the Rafizadeh children own URF. COOBGP owns a 1% general partnership interest in COOB. Mondona Rafizadeh, a Texas resident, owns all of COOBGP. No Ohio resident owns any interest in any party to the BDI/COOB Transfer.

14. As the location of the ownership, management and control of both parties to the BDI/COOB Transfer, Texas is the jurisdiction with the greatest interest in redressing the injury caused to BDI, the entity from which the parties transferred the Imperial Towers. These facts, therefore, also support the conclusion that Texas (not Ohio) has the greatest interest in the BDI/COOB Transfer and the fraudulent transfer claim.

Texas is the center of the relationship between BDI and COOB.

15. As detailed above, Texas is the center of BDI and COOB's relationship. The Rafizadehs own and control both BDI and COOB from Texas. The Rafizadehs executed all documents evidencing the interaction between BDI and COOB in Texas, including the transfer documents implementing the BDI/COOB Transfer. Even after BDI transferred the Imperial Towers to COOB, the Rafizadehs maintained control of the Imperial Towers from Texas and maintained COOB's relationships with URF, Rodrick Hughes and AMI exclusively from Texas. For example, (i) URF's lien on the Imperial Towers was documented and executed in Texas before a Texas notary public[12]; (ii) URF's transfer of the Imperial Towers Note to Rodrick

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[11] Ex. Certified 6 to Plaintiff's Opposition, Certified Copy of United Rafizadeh Family, LLP Certificate of Limited Partnership.

[12] Ex. Certified 3 to Plaintiff's Opposition, Certified Copy of Deed to Secure Debt, Fixture Filing, Financing Statement and Security Agreement dated February 6, 2006, between COOB, LP and United Rafizadeh Family, LLP.

Hughes was documented and executed in Texas before a Texas notary public[13]; (iii) Rodrick Hughes sent his purported demand letters for payment on the Imperial Towers Note from his Texas address to COOB's and AMI's Texas address[14]; and (iv) the deed transferring the Imperial Towers from COOB to Rodrick Hughes was documented and executed in Texas before a Texas notary public.[15]

16. In conclusion, other than the location of the property—which is discussed below—each fact related to the BDI/COOB Transfer reveals Texas as the jurisdiction with the greatest interest in the litigation.

C. The Location of the Property Does Not Control the Choice of Law Analysis.

17. In order to avoid any analysis of the jurisdiction with the greatest interest/most significant relationship to the litigation (which is clearly Texas), COOB argues that a fraudulent transfer is not a tort and is not governed by the most significant relationship test. Instead, COOB suggests that §223 of the Restatement applies. However, as discussed in the *ASARCO* case, there can be no real dispute that in Texas, fraudulent transfer ***is*** a tort in which either the federal common law's "greatest interest" test or the Restatement's "most significant relationship" test applies. *See ASARCO LLC*, 382 B.R. at 62 (citing numerous other cases on this point). Moreover, the introductory comments to Chapter 9 of the Restatement—which includes §223 suggested by COOB—specifically recognizes that the law of the location of the real property does ***not*** necessarily dictate the choice of law analysis between a "debtor and creditor, when

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13 Ex. Certified 4 to Plaintiff's Opposition, Certified Copy of Transfer of Lien from United Rafizadeh Family, LLP to Rodrick Hughes dated December 30, 2005.

14 See Ex. Rudd 3 and 4 to Plaintiff's Opposition, Demand letters from Hughes to COOB dated April 7, 2006, and May 8, 2006.

15 Ex. Certified 5 to Plaintiff's Opposition, Certified Copy of Warranty Deed from COOB, LP to Rodrick Hughes, dated May 30, 2006.

regulation of the relationship is of greater concern to a state other than the situs." Restatement, Ch. 9, Topic 2, Introductory Note.

18. This "greater concern" to a state other than the situs leads to the conclusion that the law of a jurisdiction other than that of the location of the situs should be applied. *See In re French*, 440 F.3d 145, 153-54 (4th Cir. 2006). In that case—a fraudulent transfer case—the court determined that the laws of the United States should apply to the fraudulent transfer claim of real property located in the Bahamas. The court noted that "modern choice-of-law principles recognize that the law of the situs does not necessarily govern the allocation of interests in land between 'debtor and creditor' if 'regulation of the relationship is of greater concern to a state other than the situs.'" *Id.* at 153 (quoting Restatement Ch. 9, Topic 2, Introductory Note). In determining that the law of the United States—rather than the law of the situs—should apply, the court noted that "most of the activity surrounding the transfer took place in the United States. Moreover, almost all of the parties with an interest in this litigation—the debtor, the transferees, and all but one of the creditors—are based in the United States, and have been for years." *Id.* at 154.

19. That "greater concern" leads to choosing Texas substantive law under either federal common law choice-of-law rules or the forum state's choice-of-law rules. As detailed above, all of the activities surrounding the BDI/COOB Transfer took place in Texas. In addition, almost all—if not all—of the parties with an interest in this litigation are based and located in Texas. Therefore, even if the Court were to determine that §223 of the Restatement (Second) of Conflict of Laws was instructive, the commentary to the section and case law indicate that the law of the situs should not be rigidly applied when, as here, another jurisdiction has a greater interest in regulating the relationship.

D. Conclusion

20. Whether this Court analyzes the issue under federal common law choice of law rules or the *Klaxon* analysis of the forum state choice of law rules, the result is the same: Texas substantive law should govern the BDI/COOB Transfer. For the numerous reasons outlined above, Texas has the greater interest in the litigation, has the most significant relationship to the occurrence and the parties, and has a greater interest in regulating the relationship between the parties. Therefore, under either the federal common law or forum state choice–of-law analysis, Texas substantive law applies to the Plaintiffs' claim against COOB for BDI's transfer of the Imperial Towers office buildings to COOB. For these reasons, COOB's Motion for Partial Summary Judgment as to Count 2 based on the argument that Ohio law governs the BDI/COOB Transfer should be denied.

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WHEREFORE, Plaintiffs request the Court to enter an order denying COOB, LP's Motion for Partial Summary Judgment and for such other and further relief, both at law and in equity, as the Court determines to be just.

DATED: July 11, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing document has been served on the parties listed below via electronic means as listed on the court's ECF noticing system on July 11, 2008.

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